SPERTUS, LANDES & UMHOFER, LLP
Matthew Donald Umhofer (SBN 206607)
Elizabeth A. Mitchell (SBN 251139)
1990 S. Bundy Drive, Suite 705
Los Angeles, CA 90025
Telephone: (310) 826-4700
Facsimile: (310) 826-4711
[redacted]

Attorneys for [Proposed] Intervenors DTLA ALLIANCE FOR HUMAN RIGHTS, JOSEPH BURK, HARRY TASHDIJIAN, KARYN PINSKY, CHARLES MALOW, and CHARLES VAN SCOY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CARL MITCHELL, MICHEAL ESCOBEDO, SALVADOR ROQUE, JUDY COLEMAN, as individuals; LOS ANGELES CATHOLIC WORKER, CANGRESS, as organizations,

PLAINTIFFS,

v.

CITY OF LOS ANGELES, a municipal entity; LT. ANDREW MATHIS, SGT. HAMER and SGT. RICHTER, in their individual and official capacities,

DEFENDANTS.

Case No. CV16-01750 SJO (JPRx)
[Assigned to the Honorable S. James Otero, Courtroom 10C]

EXHIBIT A

[PROPOSED] INTERVENORS' NOTICE OF MOTION AND MOTION FOR RELIEF FROM ORDER OR MODIFICATION THEREOF UNDER FRCP 41, 46, 59, AND 60

DATE: August 12, 2019
TIME: 10:00 a.m.
COURT: Courtroom 10C

TO THIS HONORABLE COURT, ALL PARTIES AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 12, 2019 or as soon as this matter may be heard in Courtroom 10C of the above court, located at 350 W. 1st Street, Los Angeles, CA, intervening parties DTLA ALLIANCE FOR HUMAN RIGHTS, JOSEPH BURK, HARRY TASHDIJIAN, KARYN PINSKY, CHARLES MALOW, and CHARLES VAN SCOY will and hereby do move to invalidate the stipulated order of dismissal as void under Federal Rule of Civil Procedure 60(b)(4) and object to the order of the Court approving the settlement under Federal Rule of Civil Procedure 41, 46, and 59.

Pursuant to local Rule 7-3 Attorneys for Intervenors met and conferred with counsel for both Plaintiffs and Defendants on June 10, 2019.

Dated: June 24, 2019

/s/ Elizabeth A. Mitchell
SPERTUS, LANDES & UMHOFER, LLP
Matthew Donald Umhofer (SBN 206607)
Elizabeth A. Mitchell (SBN 251139)

Attorneys for [Proposed] Intervenors

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I. INTRODUCTION

"This is Not What Progress Looks Like in the Homelessness Crisis."[1]

In a case concerned with the plight of the homeless in the "Skid Row" area of downtown Los Angeles, the Court has approved a settlement that is both unlawful and disastrous for the homeless in Skid Row and those who work, live, and own property and businesses there. Skid Row has long been a locus of human hardship. But in part because of this case, the hardship has become inhumanity.

Three years ago, this Court found that four (4) plaintiffs made a sufficient showing that their Fourth and Fourteenth Amendment rights were being violated and issued a preliminary injunction to prevent further constitutional violations. Yet the parties, instead of working towards a practicable solution to combat the systemic problems associated with property removal and storage, entered into this settlement which is unlawful and sets up the workers and residents of Skid Row—homeless, and housed alike—for disaster. And they did this without the public's input and in a way that wholly fails to balance the needs and rights of the homeless, the City, and residents and business owners.

Four years ago, life on Skid Row was hard but different—property was contained, tents were packed up and stored during the day, garbage and filth was generally managed. There were no discernible outbreaks of disease, prostitution and narcotics activity were managed, and crime of course occurred, but at a rate far lower than today.

In the years since the injunction was issued, conditions on Skid Row have declined precipitously—diseases have spread, property has proliferated, crime has spiked, and the number of homeless individuals has skyrocketed. The build-up of property makes it impossible to determine what items are a health or safety risk. (*See,*

[1] *A Court Decision Letting Homeless People Keep All Their Belongings Helps No One*, Times Editorial Board, *Los Angeles Times*, May 31, 2019

e.g. Order Granting Plaintiff's Application for Preliminary Injunction, ECF No. 51 at 5 n.4 ("The Court recognizes that in many instances, separating property that is contaminated from property that is not is, at best, difficult.")). The mountains of garbage, food waste, human waste, and contaminated items are breeding grounds for rats, which in turn are breeding grounds for disease. The ability to hide inside tents while still maintaining a public presence on the sidewalk at all hours of the day allows those engaged in criminal activity to peddle their illicit wares without concern about police interference. Human trafficking, weapons sales, narcotic activity—both using and selling—are all rampant and largely unchecked now in Skid Row. In one of the greatest, most prosperous cities in the United States, innocent people—small children whose parents lost their jobs, residents who are trying desperately to claw their way out of the cycle of homelessness and poverty, small business owners who are trying to make a living—now face conditions worse than those found in developing countries.

The homeless numbers in Los Angeles County have increased by almost half since the Court issued its injunction. The settlement is not a solution—it is an obstacle to a meaningful effort to resolve the problem of homelessness in Los Angeles. Because the settlement suffers from significant legal and substantive flaws, the settlement should be vacated.

II. LEGAL STANDARD

Intervenors move for relief from the order of dismissal under Rule 60(b)(4) as void because they had no reasonable opportunity to be heard and object to the settlement prior to dismissal. Intervenors also move for relief from the order of dismissal and/or modification of the settlement agreement under Rules 41, 46, 59(e) and 60(b) insofar as the incorporated settlement agreement of the parties violates state and federal law and is therefore void and unenforceable. To the extent the agreement

violates the law, the parties, and particularly City Defendants, had no right to enter into any such agreement and it must be invalidated by the Court.

Relief from an order of dismissal under Rule 60(b)(4) is warranted where a party or intervenor had no reasonable opportunity to be heard prior to the order becoming final. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010) (Rule 60(b)(4) applies whenever there is a jurisdictional error or "a violation of due process that deprives a party of notice or the opportunity to be heard."); *Local No. 93 Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("[A]n intervenor is entitled to present evidence and have its objections heard" on validity of consent decree.). Here, intervenors attempted to learn the contents of the settlement agreement for months, but the parties refused to discuss the terms, citing confidentiality. (Declaration of Elizabeth Mitchell, hereinafter "E. Mitchell Decl." ¶¶ 7-10.) It was not until May 29, 2019, when the settlement agreement was filed, that any non-parties learned of the agreement contents. Only two days later, on May 31, 2019, the Court signed the proposed order and dismissed the case. Forty-eight hours is an insufficient amount of time to reasonably review the settlement, research the terms, collect evidence, draft the motion to intervene, and draft this motion to relieve or modify the judgment. Because intervenors have a substantial interest in the parties' proposed remedy but had no reasonable opportunity to be heard prior to the order dismissing the case, the order is void under Federal Rule of Civil Procedure 60(b)(4).

Intervenors further object to the court order dismissing the case under Rules 41(a)(2) and 46. Rule 46 specifically provides "Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made." Intervenors, as non-parties to the case, had no opportunity to object to the order prior to it being made; moreover, Intervenors had no notice about the terms of the settlement until it was made public only two days prior to the issuance of the court order. Alternatively, Intervenors move to alter or amend the judgment under Rule

59(e) and have complied with its requirements by filing this motion within 28 days after entry of judgment.

III. ARGUMENT

A. The Parties' Settlement is Void Because it Violates State and Federal Law

Any settlement agreement that violates the law, or by its terms promotes or authorizes violation of the law, is void and cannot be enforced. *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1055 (9th Cir. 2007) ("A federal consent decree or settlement agreement cannot be a means for state officials to evade state law.") (citing *Keith v. Volpe,* 118 F.3d 1386, 1393 (9th Cir. 1997) (holding that state officials "could not agree to terms which would exceed their authority and supplant state law"); *Perkins v. City of Chicago Heights,* 47 F.3d 212, 216 (7th Cir. 1995) ("Some rules of law are designed to limit the authority of public officeholders . . . . They may chafe at these restraints and seek to evade them, but they may not do so by agreeing to do something state law forbids."). "In California, a duly enacted local ordinance has the same binding force as a state statute." *League of Residential Neighborhood Advocates*, 498 F.3d at 1055. "Municipalities may not waive or consent to a violation of their [] laws, which are enacted for the benefit of the public. Any such agreement to circumvent applicable . . . laws is invalid and unenforceable." *Id*. (internal citations omitted) (referring to a settlement agreement providing for unlawful zoning variance).

A City may disregard state law only where (i) a federal law is found to be violated and (ii) violation of the state law is mandated to cure the federal violation. *Id*. at 1058 ("[Disregard of local ordinances in the name of federal law compliance] is authorized only when the federal law in question mandates the remedy contained in the settlement.") (citing *Keith*, 118 F.3d at 1393 ("Under the Constitution, the district court could not supersede California's law unless it conflicts with any federal law.")); *see also Perkins*, 47 F.3d at 216 ("Upon properly supported findings that such a remedy is necessary to rectify a violation of federal law, the district court can

approve a consent decree which overrides state law provisions. Without such findings, however, parties can only agree to that which they have the power to do outside of litigation.").

In this case there was never an actual finding by the Court that a constitutional violation had occurred. The Court found only that Plaintiffs in their Application "made a threshold showing of a likelihood of success on the merits." Order Granting Plaintiff's Application for Preliminary Injunction, ECF No. 51 (hereinafter "ECF No. 51"), p. 3. The Court specifically noted that it was not making a factual finding:

> At the current stage of litigation, the Court cannot be asked to act as the final trier of fact. For now the Court has the limited task of determining whether to issue a preliminary injunction. In this context, the Court accepts the facts contained in Plaintiffs' affidavits as true statements made under penalty of perjury, as required by federal statute.

Id. at p. 6. Ultimately the Court concluded merely that "some of Defendants' seizures of property are unreasonable…particularly the seizure of essential medication and medical equipment." Nothing about the order can be construed as a "factual finding" that federal law has been violated, nor does it support the contention that a state law violation is mandated to cure any alleged violation. In fact, City Defendants explicitly denied that any city official "violated any laws or committed any wrongful acts or omissions against the Plaintiffs as alleged in the Action." Settlement and Release Agreement, ECF No. 119, p.6.

This settlement agreement entered into by the parties specifically allows for violations of the law, discussed in detail *infra*, and in fact was entered into in violation of the law. There was no factual finding of constitutional malfeasance that would justify an otherwise unlawful settlement. As such it is wholly void and unenforceable.

B. The Settlement Allows for Violations of Cal Civ Code § 3479

The settlement allows for significant nuisance violations and makes it impossible to enforce the codes meant to address such violations. California Civil Code section 3479 defines nuisance:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Cal. Civ. Code § 3479. Section 3479 is an "expression of the Legislature's public policy against public nuisances, and it is plainly aimed at protecting the public from the hazards created by public nuisances." *People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 136 (2017). In addition to health and safety hazards, "[a] reduction in property values caused by activities on a . . . piece of land, and an assault on the senses by noise, dust, and odors, are just the kinds of harm that common law suits to abate a nuisance are designed to redress." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 505 (7th Cir. 1996). A public nuisance is the substantial and unreasonable interference with a public right. *San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal.4th 893 (1996).

A private nuisance cause of action accrues when (1) there is an interference with a plaintiff's use and enjoyment of his property; (2) "the invasion of the plaintiff's interest in the use and enjoyment of the land [is] substantial, i.e., ... it cause[s] the plaintiff to suffer 'substantial actual damage'"; and (3) the interference with the protected interest is also unreasonable, "i.e., it must be of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land." *Mendez v. Rancho Valencia Resort Partners, LLC*, 3 Cal. App. 5th 248, 262-63 (2016).

Both private and public nuisance are implicated here and are unlawful under Cal. Civ. Code §§ 3490 *et seq* and 3501 *et seq*.

The City, by its acceptance of the settlement, is permitting public and private nuisance violations to persist unabated and unredressed. Because the settlement substantially diminishes the number and types of large items the City can remove, structures, shopping carts, and unlimited personal belongings can remain on the streets and sidewalks. The homeless count in Los Angeles has nearly doubled since the Court originally issued its injunction in 2016. *Homelessness Jumps 12% in L.A. County at 16% in the City; Officials 'Stunned'*, Benjamin Oreskes and Doug Smith, *L.A. Times*, June 4, 2019, https://www.latimes.com/local/lanow/la-me-ln-homeless-count-encampment-affordable-housing-2019-results-20190604-story.html (last visited June 24, 2019). With increased population density, unlimited property accumulation becomes a breeding ground for flea-infested rats and other vermin, which are largely responsible for the spread of disease on Skid Row. (*See* E. Mitchell Decl." Exs. 2 and 3, March 22, 2019 and June 7, 2019 Letters); *see also, LA's Rat Problem Grows Even After City Cleans Up Trash Heaps Revealed by NBC4 I-Team,* Joel Grover and Amy Corral, *NBC Los Angeles*, June 10, 2019, https://www.nbclosangeles.com/news/local/LA-Crawling-With-Rodents-511112152.html (last visited June 21, 2019). These large items also unlawfully obstruct the free passage and use of the streets and sidewalks. With increased homeless encampments come rampant drug sales and use which in turn provides a platform for violent assaults and property crimes. *Crime Amongst LA's Homeless Population Rises Again*, Eric Leonard, *NBC Los Angeles*, February 13, 2019, https://www.nbclosangeles.com/news/local/Crime-Amongst-LAs-Homeless-Population-Rises-Again-505807741.html (last visited June 21, 2019); *Crime Rises Again in Downtown*, Nicholas Slayton, *Los Angeles Downtown News*, January 15, 2019, http://www.ladowntownnews.com/news/crime-rises-again-in-downtown/article_19c44618-1834-11e9-8cc9-0b48238c2c95.html (last visited June 23, 2019) ("The 2018 figures were higher than 2016 levels in almost every category.") The structures, garbage, and other detritus allowed to flourish now that the City

cannot enforce LAMC § 56.11 creates an ongoing situation throughout Skid Row that is certainly "indecent or offensive to the senses;" sidewalks overrun by rats and human waste are "an assault on the senses by noise, dust, and odors." *Solid Waste Agency of N. Cook Cty.*, 101 F.3d at 505. Infectious diseases are unquestionably "injurious to health" and increased narcotics sales and use is in the very definition of nuisance contained in California Civil Code section 3479.

Business owners in the area have suffered an interference with the use of their property: customers cannot access their businesses or are declining to hire them due to conditions, they are spending collectively hundreds of thousands of dollars on increased sanitation and security measures, and cannot maintain tenants and employees. Both business owners and residents of the area are thus subject to substantial and unreasonable interference with their enjoyment of their property. Indeed, the streets of Skid Row cannot be traversed freely, nor without fear of germs and disease; the sidewalks are rendered unusable by human waste, garbage, and encampments.

The City even expressly recognized this interference in adopting Los Angeles Municipal Code Section 56.11:

> [T]he unauthorized use of public areas for the storage of unlimited amounts of personal property interferes with the rights of other members of the public to use public areas for their intended purposes and can create a public health or safety hazard that adversely affects those who use public areas.

The City, in accepting the settlement's terms, is now expressly permitting these nuisance violations to persist and tying its own hands in its ability to abate them.

C. The Settlement allows for Violations of LAMC § 56.11

Los Angeles Municipal Code ("LAMC") § 56.11, which concerns the storage of personal property, was enacted and later amended to address the myriad issues stemming from the accumulation of personal property on public streets. The ordinance aims to balance the needs and rights of the City's homeless with those of

the residents, businesses, and the public at large. Los Angeles Municipal Code § 56.11(1).

Specifically, § 56.11 prohibits the public storage of "bulky items," defined as "any item, with the exception of a constructed tent, operational bicycle or operational walker, crutch or wheelchair, that is too large to fit into a 60-gallon container with the lid closed, including, but not limited to, a shed, structure, mattress, couch, chair, other furniture or appliance." Los Angeles Municipal Code § 56.11(2).

The prohibition on bulky items was intended to reduce the number of structures on Skid Row, which are often built to facilitate the drug and prostitution trades, both of which contribute to the area's high crime and disease rates. The ordinance also seeks to address the proliferation of items that carry and spread disease and create a public health hazard for the residents of Skid Row. The 60-gallon limit of § 56.11 effectively enabled sanitation and police workers to determine which items were prohibited, because they were not required to make an ad hoc determination about an item's health or safety risk rating or whether an item was abandoned—a nearly impossible task on Skid Row as this Court has recognized. The bulky items restriction helps sidewalks remain clear of structures and debris, allowing customers to access local businesses, while also allowing Skid Row's residents to keep medications and essential personal items free from seizure by law enforcement. Los Angeles Municipal Code § 56.11(1).

The parties' settlement specifically prohibits City officials from seizing <u>any</u> property "absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, is evidence of a crime, or is contraband." In turn this settlement allows for persons within the area identified as "Skid Row and Surrounding Area", incorporated into the Settlement Agreement in this case (hereinafter "Designated Area"), to maintain an <u>unlimited</u> amount of property at all times. There is nothing in the settlement about a 60-gallon limit or adhering to current law. Instead the agreement inherently and explicitly permits any person within the

Designated area to violate Section 56.11. This agreement therefore is either void because it sanctions violations of the law (without the requisite constitutional finding), or it is a modification to 56.11 done without a public hearing and therefore unlawful (*see* part E *infra)*. Regardless of how the parties spin it, this agreement is a direct affront to the rule of law and is an end-run around the will of the people.

D. The Settlement Adopts and Condones Violations of the Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") provides that people with disabilities be afforded "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation …" ADA § 12182. Further, the ADA ensures that transportation facilities are constructed to a set of standards that ensures accessibility for the disabled. Sidewalks are the most common element of transportation infrastructure, yet if they are not accessible, they can pose great challenges and dangers to anyone in a wheelchair or who has other mobility restrictions.

Sidewalks are subject to the access requirements of Title II of the ADA and § 504 of the Rehabilitation Act. 42 U.S.C. § 12131(1); *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001); *see also Willits v. City of Los Angeles*, 925 F. Supp. 2d 1089, 1093 (C.D. Cal. Feb. 25, 2013) ("Any public sidewalk over which the City of Los Angeles has responsibility to inspect and notify property owners of repair needs is a "program, service, or activity" within the meaning of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973."). Accordingly, sidewalk width requirements ensure that sidewalks are accessible for use by wheelchair-bound individuals. The minimum width for an ADA-compliant sidewalk is 36 inches. 36 C.F.R. § Pt. 1191, App. D, §403.5.1 ("the clear width of walking surfaces shall be 36 inches (915 mm) minimum"). Where obstructions such as telephone poles, traffic signal cabinets, or other utilities exist, the sidewalk must be constructed to allow the minimum width requirement of 36 inches between the edge of the obstruction and the edge of the sidewalk. *Id.*

California's Disabled Persons Act also codifies requirements that ensure equal and full access to individuals with disabilities. That Act provides, in part:

> Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places.
>
> Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices . . . and other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.

Cal. Civ. Code § 54.1(a)(1).

In California, both the ADA and the analog state codes must be satisfied. The settlement specifically purports to address ADA compliance in a section entitled "Impeding ADA Access or Ingress/Egress," which provides that the City may seize property that blocks required ADA access, or ingress or egress into any building, if the property cannot reasonably be moved to provide "appropriate clearance." (*Settlement* (4)((f)(i).). If the property is attended and the person attending it refuses to move it, or the property is unattended "and City personnel responsible for moving unattended property" decides it cannot be moved, then the City is authorized to seize the property outright. (*Id*. (4)((f)(ii).) The settlement makes the ADA unenforceable in practice; this language is mere lip service and does nothing to address the realities of living or working on Skid Row.

Plaintiff Charles "Chuck" Van Scoy suffers from multiple illnesses and as a result is confined to a wheelchair. He has lived at the Union Rescue Mission on Skid Row for the past three years and intends to stay for the foreseeable future. To travel anywhere, Mr. Van Scoy must be able to freely move his wheelchair down the sidewalk—something he cannot do on most of the sidewalks on Skid Row. He cannot circumvent the debris, encampments, and structures that block his path, oftentimes

stretching from building to street. Because of his disability, Mr. Van Scoy has no means of moving the property himself; rather, if no clear path exists, he is simply stuck and unable to move.

Under the terms of the settlement, if that property blocking the sidewalk is unattended, "City personnel responsible for moving the unattended property" makes a determination about whether the property can be moved to provide required access, or whether it should be seized. Similarly, if the property is attended but its owner refuses to move it, the same "City personnel" can move it. The settlement thus leaves Mr. Van Scoy in a position either to have to confront the property's owner himself—which, on Skid Row, is a dangerous proposition—or find someone else to move it. Is Mr. Van Scoy responsible for attempting to confirm that the property is preventing "appropriate clearance"? Even if he knew whom to contact and had a means of doing so, how long would it take for such a person to arrive, assess the situation, and remove the barrier? Does that process then repeat itself every two to three feet, as Mr. Van Scoy tries to make his way down a sidewalk that is overflowing with tents, structures, belongings, and garbage? The settlement provides no guidance.

Furthermore, California's Unruh Civil Rights Act provides:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Cal. Civ. Code § 51(b). The businesses along Skid Row, then, are required to comply with the Unruh Civil Rights Act and ensure equal access to their establishments. They cannot do so, however, under the terms of the settlement. When the sidewalk is so riddled with encampments and debris that a disabled person cannot effectively use it, that person is denied equal access to any establishment along that sidewalk—thus rendering the business owner in violation of both the Unruh Act and the ADA, and leaving them with no means or recourse to correct the violation.

The settlement provides nothing more than an illusory promise of ADA compliance. Mr. Van Scoy and others like him effectively cannot use the sidewalks on Skid Row under the settlement, and are therefore condemned to stay in one spot, at all times. For Mr. Van Scoy, that spot is the Union Rescue Mission shelter. Others aren't so lucky, and remain confined to a disease-ridden tent or trash heap. To effectively travel in this area under the terms of the settlement, Mr. Van Scoy and other disabled persons would essentially need "City personnel" to accompany them everywhere they go, clearing the path ahead.

For business owners such as Messrs. Tashdijian, Burk, Rauch, and Shinbane, disabled customers often cannot reach their respective business through no fault of their own, yet the business would be liable for any and all civil rights violations that follow. They, too, would have to identify and contact the appropriate "City personnel," likely multiple times per day, to have constantly clear a path to his establishment. The settlement simply does not contemplate or provide for these issues.

The terms of the settlement, although they purport to address ADA concerns, fall woefully short.

E. The City Council Failed to Comply with the Brown Act Before Authorizing this Settlement

It is uncontested that the terms of the settlement are inherently inconsistent with Los Angeles Municipal Code Section 56.11. Therefore, the settlement either violates Section 56.11, and is necessarily void as discussed *supra*, or must be read to have modified 56.11, in which case it was done in violation of The Brown Act and therefore void.

1. The City was Required to Comply with the Brown Act

The Ralph M. Brown Act, California Government Code § 54950 *et seq* ("the Brown Act"), requires all legislative body meetings to be open and public (§ 54953) and to provide the public an opportunity to comment on pending items before the body (§ 54954.3). A hearing is required under the Brown Act "to protect the rights of

members of the public specifically affected by the action." *Trancas Prop. Owners Assn. v. City of Malibu*, 138 Cal. App. 4th 172, 185-86 (2006).

The Brown Act requires a public hearing when "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (§ 54953, subd. (a)).

The City Council made a collective decision when it decided by an "actual vote by a majority of the members" to authorize settlement of the *Mitchell* case on terms that substantially modify an existing ordinance.

Reconciling the often-conflicting interests of the homeless, the City, and local business owners requires considered input from each. That is exactly what happened and what was achieved by LAMC § 56.11. Nevertheless, on March 6, 2019, the City Council recessed to closed session to consider settling the 2016 *Mitchell* suit without seeking that input. After returning to open session, the City Council announced that it had, in closed session, voted to authorize settlement of the case by a 10-2 vote. On May 29, 2019, the settlement was approved and filed.

The settlement adopts a new reading of the term "bulky item" within LAMC § 56.11. In its current iteration, the ordinance prohibits "any item that can't fit into a 60-gallon container with the lid closed" from being stored on the streets and sidewalks. The settlement eliminates this definition entirely—thus effectively modifying this ordinance within the designated area.

Eliminating the 60-gallon limit will allow large-scale items, including semi-permanent and permanent structures, to proliferate unchecked. These structures are often built to facilitate and conceal the drug and prostitution trades, both of which contribute to the area's high crime and disease rates. Other large items such as mattresses and shopping carts further block the sidewalks from their intended use and

allow bacteria to fester and spread. The ripple effect on local businesses and residents, as well as police and sanitation workers struggling to keep these problems in check, will be significant.

The City Council authorized the City Attorney to approve the *Mitchell* settlement, incorporating terms that include this substantive—and detrimental—modification of LAMC § 56.11. Accordingly, the mandates of the Brown Act were triggered, requiring a public hearing "to protect the rights of members of the public specifically affected" by the settlement.

2. <u>The Closed-Session Litigation Privilege Does Not Apply</u>

The Brown Act itself is silent on closed-session adoption of settlements in pending litigation, but courts have interpreted it to implicitly permit such an exemption to the open-meeting requirement. *See Southern California Edison Co. v. Peevey*, 31 Cal. 4th 781 (2003) (discussing with approval 75 Ops. Cal. Atty. Gen. 14 (1992)).

However, one recognized exception to the "closed-session litigation privilege" is where a city council, by settling litigation, is taking "action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard." *Trancas*, 138 Cal. App. 4th at 186.

Specifically, in finding a closed-session adoption of a settlement agreement granting a zoning variance unlawful, the *Trancas* court declared:

> As a matter of legislative intention and policy, a statute that is part of a law enacted to assure public decision-making, except in narrow circumstances, may not be read to authorize circumvention and indeed violation of other laws requiring that decisions be preceded by public hearings, *simply because the means and object of the violation are settlement of a lawsuit.*

Id. at 186 (emphasis added).

The court further narrowed the litigation privilege, stating, "What they may not do is decide upon or adopt in closed session a settlement that accomplishes or provides for action for which a public hearing is required by law, without such a

hearing." *Id*. at 187; *see also Keith*, 118 F.3d at 1393 (holding that state officials "could not agree to terms which would exceed their authority and supplant state law").

The Attorney General's own Brown Act handbook expressly makes the same distinction regarding the litigation privilege. "The purpose of [§ 54956.9] is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." (Cal. Dept. of Justice, Off. of Atty. Gen., *The Brown Act* (2003), p. 40). Yet a policy decision is precisely what the *Mitchell* settlement amounts to; its terms substantially modify LAMC § 56.11—the effect of which is to tie the City's hands with respect to the large items and structures accumulating on Skid Row.

These changes will affect not only the homeless population of Skid Row, but the business owners, patrons, and residents in the surrounding areas—all members of the public specifically affected by the action who had a right to be heard before any settlement is finalized.

In authorizing the City Attorney to settle *Mitchell* on specific terms that substantially modify an existing ordinance, City Council took action on an item that by law required a public hearing. Because the City violated the Brown Act in accepting the settlement, the Court can and should invalidate the settlement.

F. The City Has Improperly Delegated its Police Power

If a settlement agreement by its terms limits a government's right to enact or enforce policies or regulations in the future, that agreement is outside the City's authority and should be invalidated by the court. "Land use regulations… involve the exercise of the state's police power, and it is settled that the government may not contract away its right to exercise the police power in the future." *Avco Cmty. Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 800 (1976); *see also Summit Media LLC v. City of Los Angeles*, 211 Cal. App. 4th 921, 936 (2012) (settlement exempting parties from current municipal ordinances was invalid *ultra vires* act); *Trancas*, 138 Cal. App. 4th at 186 (same).

"It is well established that governments cannot divest themselves by contract of the right to exert their governmental authority 'in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties.'" *City of Glendale v. Superior Court*, 18 Cal. App. 4th 1768, 1778-79 (1993). The governing inquiry is "whether a disputed contract amounts to a local entity's "surrender," "abnegation," "divestment," "abridging," or "bargaining away" of its control of a police power or municipal function." *Cty. Mobilehome Positive Action Comm'n, Inc. v. Cty. of San Diego*, 62 Cal. App. 4th 727, 738 (1998) (quoting *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 734 (1976); *Alameda County Land Use Ass'n v. City of Hayward*, 38 Cal. App. 4th 1716, 1725 (1995); *Professional Engineers v. Department of Transportation*, 13 Cal. App. 4th 485, 585 (1993); *City of Glendale* 18 Cal. App. 4th at pp. 1778–81. Protecting the health and safety of its citizens is "primarily, and historically . . . a matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). Health and safety issues are at the very heart of a state's police powers, with states regulating "the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

The settlement here substantially abridges the City's control of that essential police power. Where the City was previously authorized by LAMC § 56.11 to maintain a 60-gallon limit on bulky items, it has surrendered that power in the name of settlement. The City has improperly bargained away the critical police function of keeping Skid Row and its surroundings safe, accessible, disease-free, and crime-free.

League of Residential Neighborhood Advocates v. City of Los Angeles is instructive. In that case, citizens filed suit against a municipality and religious congregation, alleging that a settlement agreement between the municipality and congregation effectively granted a conditional use permit to operate a synagogue in

area zoned solely for residential use. The Ninth Circuit held the settlement invalid because the municipality "is now contractually obligated to tolerate the conditional use approved in the Agreement and may not enforce Section 12.08 or any other zoning ordinance to the extent that they deviate from the Agreement's provisions." Furthermore, the court rejected "any argument that the City may circumvent its zoning procedures by referencing its general authority to settle litigation under § 273(c) of the city charter. Section 273(c) . . . does not purport to authorize contractual exemptions from zoning requirements." 498 F.3d 1052, 1057 (9th Cir. 2007).

The same is true here. The City has contracted away its right to enforce LAMC § 56.11 to the extent that it deviates from the terms of the settlement; it may not do so under its authority to settle litigation or any other provision. The City may not circumvent enforcement of its own ordinances in order to settle litigation, and the Court should accordingly invalidate the settlement.

G. The Settlement Violates the Equal Protection Clause of the Fourteenth Amendment

The settlement by its very terms requires city officials to apply the law differently to persons who live within the Designated Area than those who live in other parts of the City of Los Angeles. When the only justification for such disparate treatment is based on the high concentration of homeless population, it must fail for lack of rational basis because the opposite should be true: high concentration of persons living on the street should rationally lead to increased enforcement due to risk of disease and crime and reduced use of public rights-of-way.

The settlement agreement, with its broad policy changes, affects only a one-mile square block within the heart of Los Angeles. The parties must show this unequal treatment is "rationally related" to a "legitimate government interest." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973). While such a showing sets a low bar, the standard is not "toothless," *Matthew v. Lucas*, 427 U.S. 495, 510 (1976), and still "must find some footing in the realities of the subject addressed by the legislation," *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993).

Here the parties presumably will point to the high concentration of homeless within the Designated Area, an individual's constitutional right to maintain their own property, and the lack of adequate storage facilities, as a basis to justify the policy. But none of that is rationally related to the agreed terms of the settlement. No court has ever concluded that a person has the constitutional right to unlimited storage of personal property on public sidewalks, and the answer to lack of adequate storage facilities is to build more storage facilities, not permit the streets to be overrun with disease and needles. And as noted previously, the high concentration of homeless persons in the Designated Area should cause increased enforcement of property regulations, not decreased. The reasons are clear: unlimited property restrictions causes rodent infestation which leads to massive disease outbreaks and public health crises, the anonymity associated with massive encampments on public sidewalks leads to increased drug and sex trafficking and its concomitant violent activity, and the blocking of sidewalks causes people, including those in wheelchairs and pushing small children in strollers, to have to walk in the streets in one of the most vehicle-dense cities in the nation. This is what we have seen over the last three years, and what we will continue to see with increased regularity. Moreover, the problem has been and will be compounded by the disparate treatment itself: by continuing to enforce property regulations in other parts of the City (and in another adjacent cities), homeless persons will necessarily be channeled into the Designated Area increasing the concentration and deteriorating conditions even further. And it invites Fourteenth Amendment challenges from those outside the Designated Area as well.

Intervenors do not quibble with the Court's 2016 order issuing the Preliminary Injunction; the measures taken by the Court evidently appeared reasonable and necessary to address the issues at the time. But the parties – and the City in particular – have had 3 years to implement workable solutions which pass constitutional muster without trampling on the rights of others who live and work within the Designated

Area and the rest of Downtown. This settlement fails to accomplish that goal and its unequal treatment is not rationally based in any legitimate interest.

IV. CONCLUSION

For the foregoing reasons, intervening parties respectfully request the Court vacate its order approving the parties' settlement or modify the terms consistent with intervenors' objections herein.

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/s/ Elizabeth A. Mitchell

SPERTUS, LANDES & UMHOFER, LLP
Matthew Donald Umhofer (SBN 206607)
Elizabeth A. Mitchell (SBN 251139)

Attorneys for [Proposed] Intervenors